

## **Electronic discovery TO COME**

Technology has transformed modern business. E-mail, the Internet, and the ability to cheaply and easily catalog electronic data have made businesses more efficient and more responsive to the needs of their customers. But it has also transformed the nature of litigation and the types of information a business is obligated to disclose when it becomes involved in a lawsuit. In recent years both the Indiana and the Federal Court Rules have been specifically modified to account for the discovery of electronically stored information. Tuesley Hall Konopa can help you identify some potentially troublesome issues and provide guidance regarding the discovery of electronic business records.

The greatest danger involved in electronic discovery is that the opposing party may accuse your business of ignoring its obligations to maintain data or worse, assert that you have intentionally destroyed relevant information. If the court agrees and determines that you or your employees intentionally deleted discoverable information, sanctions may be imposed. The court may give a spoliation instruction and permit the jury to infer that the missing evidence would have been damaging to your case. And if the court decides that the discovery violation was particularly egregious, it may impose even more extreme sanctions, such as the entry of a default judgment.

### **A little planning goes a long way.**

The best way to avoid problems with electronic discovery is to plan ahead. Your business should develop and adhere to both a general policy regarding electronic records and a specific plan in the event of litigation. The overall policy should determine the type of records that will be maintained in the ordinary course of business and how long those records will be kept. What constitutes a reasonable policy will necessarily depend on the nature of the industry and cost considerations. For example, a sole

proprietorship may be able to store many years worth of data on a single hard drive for relatively little cost. On the other hand, many large companies with hundreds of employees must arrange for the automatic deletion of certain files, such as e-mails after a certain number of days, for cost management reasons. Cost permitting, a business should err on the side of caution and retain too much information rather than too little. But if electronic data must be deleted, it is much easier to establish that this was not done with bad intent, and thus avoid potential sanctions, if it was done pursuant to an established plan. According to both the Indiana and the Federal rules regarding discovery, "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system. "<sup>1</sup>

In addition to your general information retention policy, your business should develop a specific plan of action when faced with actual or potential litigation. First, examine your electronic records management system and implement a hold preventing the updating, deletion, or alteration of any data relevant to the subject matter of the dispute and the time in question until such information can be copied or otherwise preserved. Next, determine whether there are any other repositories of pertinent electronic information, such as e-mail files maintained by individual employees, and prevent the possible deletion of this information.

Further, it should be remembered that, even though there is a duty to preserve electronically stored data, all such information is not necessarily discoverable. Privileges, such as the privilege protecting attorney-client communications, may protect some of the information and prevent it from being used by the opposing side. As with traditional paper discovery, all information requested by an opposing party should be reviewed by counsel before being turned over.

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<sup>1</sup> See Federal Rule of Civil Procedure 37(e) and Indiana Trial Rule 37(E)

**Fortunately, the law protects your time and money.**

Finally, the rules contain limitations designed to protect parties from having to spend excessive amounts of time and money on electronic discovery. Specifically, “a party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.”<sup>2</sup> For example, many businesses constantly save information to a disaster-recovery system, which would allow them to stay in business in the event some catastrophe destroyed their computer system. Often, such back-up systems are not easily searchable. Although the disaster-recovery tapes may contain relevant information, it could require hundreds or even thousands of hours to actually retrieve the specific data sought through a discovery request. In such situations, the rules contemplate that the parties will attempt to work together in good faith to resolve the situation. If no compromise is reached and the court becomes involved, it will determine whether to compel production or enter a protective order based on factors that include: (a) the specificity of the discovery request; (b) the quantity of information at issue; (c) the likelihood of finding the requested material from other, more accessible sources; and, (d) the parties’ resources.

As in most areas, new technology is a double edged-sword when it comes to litigation. The prevalence of electronically stored information provides litigants with more and often more easily accessible sources of evidence to support their claims or defenses. On the other hand, electronic discovery also presents many new challenges and concerns for businesses. But with planning and forethought, many of the pitfalls of litigation in the information age can be avoided.

If you are faced with litigation that may include discovery of electronic documents, consult an attorney who can help you manage the process and understand your obligations to provide current or recovered data.

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<sup>2</sup> See Federal Rule of Civil Procedure 26(b)(2)(B) and Indiana Trial Rule 26(C)(9).

To learn more about electronic discovery or litigation services provided by the [South Bend law firm](#) of Tuesley Hall Konopa, LLP visit us online or call attorney Mark. D. Kundmueller at **574-232-3538**. Mark can also be reached by [email](#).



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